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Vol. XI

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 603

L. P. LARSON, JR., COMPANY, PETITIONER,

vs.

WM. WRIGLEY, JR., COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1927.

CERTIORARI GRANTED DECEMBER 5, 1927.

(33,055)

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1927.

No.

L. P. LARSON, JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY, JR. COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RECORD

CHARLES H. ALDRICH ESQ.,
GEORGE I. HAIGHT ESQ.,
CHESTER D. KERN ESQ.,
RALPH L. PECK ESQ.,
Counsel for Petitioner.

ISAAC H. MAYER ESQ.,
WALLACE R. LANE ESQ.,
Counsel for Respondent.

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the sixth day of October, 1925, of the October Term in the year of our Lord one thousand nine hundred and twenty-five and of our Independence the one hundred and fiftieth.

And afterwards, to wit: On the twenty-seventh day of February, 1926, there was filed in the office of the clerk of this court a Certificate to Exhibits, which said Certificate to Exhibits is in the words and figures following, to wit:

United States of America
Northern District of Illinois } ss.
Eastern Division

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that I herewith transmit to the United States Circuit Court of Appeals for he Seventh Circuit all original exhibits or reproductions of exhibits called for in the Praecipes of the parties on file in the Clerk's Office, in the case entitled Wm. Wrigley Jr. Company vs. L. P. Larson, Jr. Company, In Equity #30563 and #488.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the city of Chicago, this 27th day of February, A. D. 1926.

(Seal) CHARLES M. BATES,
Clerk.

Endorsed: Filed February 27, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the fifteenth day of March, 1926, there was filed in the office of the clerk of this court a Notice re Printing Exhibits, which said Notice is in the words and figures following to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

L. P. Larson, Jr. Company
vs.
Wm. Wrigley, Jr. Company } No. 3727

Wm. Wrigley, Jr. Company
vs.
L. P. Larson, Jr. Company } No. 3728

NOTICE.

Hon. Edward M. Holloway, Clerk, U. S. Circuit Court of Appeals, Chicago, Illinois:

You will please have the following exhibits printed and bound in separate volumes to be known as the Books of Exhibits. This request is in accordance with Paragraph 4, of a stipulation entered into between the above entitled parties June 3, 1925 duly approved by the Judge of the trial court.

Larson Exhibits: 9–12, 14, 19, 21 A-J, 22, 24, 25A, ~~44–46~~, 48–50, 54–57, 59–74, 76–78, 80, 85, 86, 92–94, 98, 101–109, 121, 126, 127, 131, Ex. L, N of Larson Ex. 132, 138–154, 156, 161–164, 168–184, 185–188, 189–190, 193–194–195

Wrigley Exhibits: 1–12, 15–19, ~~22–34–36–37~~, 38–42, ~~44–45~~, 47–48, 52 Kirkman 1–37, 53 Borden 1–7, 54 Becton 1–4, 55–57, 59, 60, 63 Atwood 1–7, 64 Buck 57–64, 65, 65 Stanley 1–20, 30, 32, 66–69, 70 Emerich 1, 71 Stanley 1 (8 sheets), 72–91, 92 Bennington 1, 2, 13–21, 93–96, 100–108

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ISAAC H. MAYER
WALLACE R. LANE
Counsel for Wm. Wrigley Jr. Co.

Endorsed: Filed March 15, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-third day of March, 1926, there was filed in the office of the clerk of this court a stipulation and order of the District Court, which said stipulation and order are in the words and figures following, to wit:

United States of America
Northern District of Illinois } ss:
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

Wm. Wrigley Jr. Company,
Plaintiff and defendant to counterclaim,
vs.
L. P. Larson Jr. Company,
Defendant and counterclaimant.
} In Equity No. 488.

STIPULATION.

Both parties hereto having taken and been allowed separate appeals at the same time from a decree entered herein directing said plaintiff, Wm. Wrigley Jr. Company, to pay said defendant, L. P. Larson Jr. Company, $1,384,649.48 with six per cent interest from November 13, 1923, and costs, they do hereby, with the consent of the court, stipulate as follows:

1. A single transcript of record shall be prepared in said cause which shall include any portion of the record or proceedings in said cause, or in the suit of Wm. Wrigley Jr. Company vs. L. P. Larson Jr. Company, *et al*, being case No. 30563 in said court, deemed essential by either party to a decision of the questions presented by its appeal. When filed in the Circuit Court of Appeals for the Seventh Circuit, said transcript of record shall serve as the record in said court in both said appeals.

2. The evidence which either party deems essential to the decision of the questions presented by its appeal, shall be included in said record, and shall be stated in simple and condensed form, and the testimony of witnesses shall be stated in narrative form, save that, to the extent that either party desires it, the other party hereby consents that any part of the testimony shall be reproduced in the exact words of the witness. All parts of the evidence which both parties deem not essential to the decision of the questions presented by either of said appeals, shall be omitted from the record.

3. Said Wm. Wrigley Jr. Company shall have up to and including August 12, 1925, within which to prepare and file its praecipe, and prepare and lodge in the office of the clerk of said District Court its statement of the evidence in condensed and narrative form, instead of up to and including June 20, 1925, as ordered herein on March 20, 1925.

(a) Said Praecipe shall indicate the portions of the record which said Wm. Wrigley Jr. Company desires to be incorporated into said transcript of record, in addition to the praecipe of the L. P. Larson Jr. Company filed herein on May 7, 1925. Before filing its said praecipe, said Wm. Wrigley Jr. Company shall serve a copy thereof on the solicitors of said L. P. Larson Jr. Company, and should they desire additional portions of the record incorporated into said transcript, they shall file with the Clerk of said District Court their praecipe within forty-five days after said Wm. Wrigley Jr. Company has filed its said praecipe.

(b) Said Wm. Wrigley Jr. Company shall also notify the L. P. Larson Jr. Company's solicitors of its lodgment of its said condensed statement in the office of the Clerk of said District Court, and shall name a time and place when it will ask the court, or judge to approve said statement, the time so

named to be at least ten days after such notice and not more than forty-five days after such lodgment. At the expiration of the time so named, or such further time as the court or judge may allow, said condensed statement, together with any objections made or amendments proposed by either party, shall be presented to the District Court or judge for approval, and when so approved and filed, it shall serve as the condensed statement of the evidence to be used on both said appeals.

4. Any exhibits desired to be reproduced by either party shall be printed and bound by the Clerk of said Court of Appeals, in a separate volume, to be known as the Book of Exhibits, properly indexed and numbered for convenient use by the court and parties.

5. The initial cost and deposits for preparing and printing said joint record and Book of Exhibits as herein provided, shall be borne and advanced in the first instance in the proportion of $\frac{1}{3}$ by L. P. Larson Jr. Company and $\frac{2}{3}$ by Wm. Wrigley Jr. Company, subject, however, to such reimbursement as shall be fixed on final decree.

6. A sufficient number of copies of the record and Book of Exhibits as thus determined shall be printed by the Clerk of the Circuit Court of Appeals, so that either party desiring so to do may seek relief in the Supreme Court of the United States without the delay and expense incident to reprinting the record.

7. Both parties having already filed their appeal bonds herein, it is understood that the said District Court retains jurisdiction for the purpose of completing the record for appeal, as herein provided.

8. When the parties hereto shall have filed their respective praecipes, as hereinbefore provided, and when said condensed statement of evidence prepared by said Wm. Wrigley Jr. Company (together with the amendments thereto, if any, made by either party, as aforesaid), shall have been approved by said District Court or judge, the L. P. Larson Jr. Company shall have leave to and shall withdraw its condensed statement of record filed by it herein on May 7, 1925, and the Wm. Wrigley Jr. Company, shall have leave to and shall withdraw its praecipe filed herein on May 18, 1925.

9. It is agreed that the time for filing the record on said

appeals with the Clerk of said Court of Appeals shall be extended up to and including September 28, 1925.

ISAAC H. MAYER
WALLACE R. LANE
Solicitors for said Wm. Wrigley Jr. Co.
CHARLES H. ALDRICH,
FRANK F. REED,
GEORGE I. HAIGHT,
Solicitors for said L. P. Larson Jr. Co.

Approved June 3, 1925.
JAMES H. WILKERSON,
Judge, United States District Court.
Approved ....., 1926.

.....
U. S. Circuit Judge.

Endorsed: Filed March 23, 1926. Edward M. Holloway, Clerk.

United States of America,
Northern District of Illinois, } ss:
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

Wm. Wrigley Jr. Company, *Plaintiff and defendant to counterclaim,* *vs.* L. P. Larson Jr. Company, *Defendant and counterclaimant.*	In Equity No. 488.

ORDER FIXING TIME FOR FILING PRAECIPE AND CONDENSED STATEMENT OF EVIDENCE AND PROVIDING FOR SUBMISSION OF ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS.

On the stipulation of the parties this day made in open court by their respective solicitors and it appearing to the

court that it is necessary or proper that all the original exhibits filed herein should be inspected in the Circuit Court of Appeals upon the appeals this day taken herein by said Wm. Wrigley Jr. Company and said L. P. Larson Jr. Company respectively, it is hereby Ordered that all of said exhibits excepting Larson Exhibits numbered 30 to 36 respectively, both inclusive, remain on file with the Clerk of said District Court and be by him sent to the Court of Appeals upon the hearing of said appeals and that said Larson Exhibits numbered 30 to 36 respectively, both inclusive, may be retained for safekeeping in the custody of said Wm. Wrigley Jr. Company subject, however, to be produced at the request of either said Circuit Court of Appeals or said L. P. Larson Jr. Company. And it is further hereby Ordered that no exhibits need be included in the transcript of the record for either of said appeals.

It is further hereby Ordered that said Wm. Wrigley Jr. Company have up to and including June 20, 1925, in which to prepare and file its praecipe and statement of the evidence in condensed or narrative form as provided by the Rules of Practice for the Courts of Equity of the United States.

Enter:

JAMES H. WILKERSON,
Judge.

March 20, 1925.

Endorsed: Filed March 23, 1926. Edward M. Holloway, Clerk.

And on the same day, to wit: On the twenty-third day of March, 1926, the following further proceedings were had and entered of record, to wit:

Tuesday, March 23, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.

L. P. Larson, Jr. Company
3727 *vs.*
Wm. Wrigley, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On stipulation of the parties in the above entitled cause, it is hereby ordered that the stipulation (a copy of which is filed herewith) respecting the preparation of the record on said appeal, etc., which stipulation has heretofore been approved by the District Court, and also the order of the District Court (copy of which is filed herewith) ordering the exhibits filed in connection with the accounting record below be sent to this court be, and the same are hereby approved.

And afterwards, to wit: On the twenty-fourth day of March, 1926, there was filed in the office of the clerk of this court a Certificate of Original Transcript of Evidence before the Master, which said Certificate is in the words and figures following, to wit:

United States of America
Northern District of Illinois } ss.
Eastern Division

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that I herewith transmit to the United States Circuit Court of Appeals for he Seventh Circuit, certain original exhibits in the case entitled Wm. Wrigley Jr. Company, vs. L. P. Larson Jr. Company, In Equity, No. 488, said exhibits are marked as follows, to wit:

Volumes 1 to 15, inclusive, of original transcript of evidence and exhibits taken before the Master, as per Order of March 18, 1926.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, this 19th day of March, A. D. 1926.

CHARLES M. BATES,
(Seal) *Clerk.*

Endorsed: Filed March 24, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the ninth day of April, 1926, the following further proceedings were had and entered of record, to wit:

Friday, April 9, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.

L. P. Larson, Jr. Company
3727 *vs.*
Wm. Wrigley, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Permission is hereby given counsel for the Wrigley Company to withdraw for two weeks from the clerk of the Court of Appeals for the purpose of reproducing the same in the record before this court the sheet containing eight counterbands made an exhibit to the Larson Company Answer.

And afterwards, to wit: On the twelfth day of April, 1926, there was filed in the office of the clerk of this court a Certificate of Clerk, which said Certificate is in the words and figures following, to wit:

United States of America
Northern District of Illinois } ss.
Eastern Division

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that I herewith transmit to the United States Circuit Court of Appeals for he Seventh Circuit, certain original exhibits in the case entitled Wm. Wrigley Jr. Company, v. L. P. Larson Jr. Company, No. 488, said exhibits are marked as follows, to wit:

Volume XVI, (PP. 7211-7689),

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, this 20th day of March, A. D. 1926.

CHARLES M. BATES,
(Seal) *Clerk.*

Endorsed: Filed April 12, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-second day of April, 1926, there was filed in the office of the clerk of this court a Notice, which said Notice is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1925.

L. P. Larson Jr. Company,
Appellant,
vs.
Wm. Wrigley Jr. Company,
Appellee.

Wm. Wrigley Jr. Company,
Appellant,
vs.
L. P. Larson Jr. Company,
Appellee.

NOTICE.

To Messrs. Isaac H. Mayer and Wallace R. Lane:

You are hereby notified that on Thursday morning, April 22, 1926, at 9:30 o'clock, or as soon thereafter as we can be heard, we will move the court that the above entitled appeals be set down for hearing before the date of the summer adjournment, and that an order be entered speeding the printing of the record in said cause; that the two said cases be consolidated for hearing and that the counsel for the Larson Company be adjudged to have the right to open and close the argument in said consolidated causes.

CHARLES H. ALDRICH
GEORGE I. HAIGHT

Received a copy of the above and foregoing notice, this 20th day of April, 1926.

WALLACE R. LANE
By RALPH M. SNYDER
ISAAC H. MAYER

Endorsed: Filed April 22, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twelfth day of May, 1926, there was filed in the office of the clerk of this court a Stipulation, which said Stipulation is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit

Wm. Wrigley Jr. Company,
vs.
L. P. Larson, Jr. Company,
Id.
ats.
Id.
} Nos. 3727-3728.

STIPULATION.

Both parties being desirous to avoid duplications in the record It Is Hereby Stipulated by and between the parties through their respective counsel that the documents hereinafter set forth need not be duplicated but shall be inserted in full where they first appear and may be stricken out where they subsequently appear with an appropriate reference to the record.

Larson exhibits 10, 11, 12 and 13 should be stricken out of pages 2961-4 of the record with a statement that they appear at pages 569-571 of the record.

Larson exhibit 18 should be stricken from pages 2981-2983 and from pages 3098-3100 with the statement that they appear at pages 588-590.

Statements of counsel at page 3024 should be stricken out with reference to page 3026 where the same statements appear with additional matter.

The opinion of Judge Carpenter at pages 3060-3064 and also at pages 3073-3076 should be stricken out with the statement that it appears at pages 3032-3036.

Exhibit a at page 3049-3051 should be stricken out with the statement that it is copied at pages 515-518.

Exhibit e at pages 3064-3065 with the statement that it is copied at pages 3036-3037.

WALLACE R. LANE,
Counsel for Wm. Wrigley Jr. Co.
CHARLES H. ALDRICH,
Of Counsel for L. P. Larson Jr. Co.

Date: May 11, 1926.

Endorsed: Filed May 12, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the second day of June, 1926, there was filed in the office of the clerk of this court a Stipulation and attached sheets, which said Stipulation and attached sheets are in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Wm. Wrigley Jr. Company,
vs.
L. P. Larson Jr. Company,
Id.
ats.
Id.
} Nos. 3727-3728.

STIPULATION.

It Is Hereby Stipulated by and between the parties hereto that the following corrections may be made in the narrative form of evidence to be printed in the above entitled cause.

1. Insert the attached sheet marked A in lieu of the corresponding page now appearing in the narrative on file in the Clerk's office.

2. On the page at which 2108 appears, the words "of Chicago and in" should be inserted after the words "outside" in the first line.

3. Strike out the last 11 lines on the page on which 2110 appears and the first four lines on which page 2111 appears and substitute therefor the attached marked B.

4. On the page at which 1116 appears the word "don't" in the fifth line from the top should be stricken out.

WALLACE R. LANE,
Counsel for Wm. Wrigley Jr. Co.
CHARLES H. ALDRICH,
Counsel for L. P. Larson Jr. Co.

June 1, 1926.

Filed Jun 2, 1926, Edward M. Holloway, Clerk.

A.

Wednesday, October 19, 1921.

2475 Ten-Thirty o'clock A. M.

(The matter of the motion made by counsel for L. P. Larson Jr. Company on September 23, 1921, appearing

at pages 2458 et seq., that the Master instruct the accountant appointed by him as to certain matters of law, etc., came on to be heard.

Mr. Aldrich: At a prior session of this court I submitted in behalf of the counter claimant certain instructions which I asked you to give to the court's accountant with reference to the preparation of his report, and I desire first to ask an additional instruction. The court will, of course, understand that in asking these instructions which have been spread of record, which I desired they should be, we did not expect the court to adopt the identical language. We are submitting them, and asking that the substance as stated be given. I do not intend to argue them because your Honor is familiar with all mat-
2476 ters of accountancy, and it does not seem to me to be necessary. Mr. Mayer made a remark or objection at the close of the other hearing, when they were presented, which I thought had force, and as you will see by the last of these instructions the reservation is intended to meet what he said at that time. They are all copied in, and I ask that the following be copied in:

"If you find from your examination made under the terms of the decree that profits were realized by the William Wrigley Jr. Company from its manufacture and sale of doublemint gum in its infringing dress, the L. P. Larson Jr. Company will be entitled to recover interest on the amount of such profits at the rate of five per cent per annum from the date on which the William Wrigley Jr. Company ceased to use the infringing dress.

"In giving you these instructions on the several items of account it is intended only that the account should be stated on the basis named, but it is understood that the Master reserves to himself the right to change the same in any respect upon the final hearing if the evidence requires such change."

(Argument followed).

The Master: Motion denied.

B.

2110 "Mr. Mayer: Q. Now, the question I asked you a few minutes ago and which you have not yet answered was, do you say you personally travelled outside of the City of Chicago and sold your Wintermint gum in Illinois outside of Chicago in December 1913?

A. To the best of my knowledge and belief I did, yes sir.

Q. Where?

A. I can't think of the little towns as I have made several trips with a new brand of stuff or anything we would have that's new to find out for myself what the public thought of it and I can't recall.

Q. But you do now have a distinct recollection that in the month of December, 1913, you visited some towns in the State of Illinois outside of Chicago and did then and there sell Wintermint gum for cash?

A. Oh yes, there is no question about it.

2111 Q. There is no question about it?

A. Yes sir.

Q. And you can't tell us the names of a single one of the towns or cities or villages?

A. Well, I have gone to Kankakee.

Q. You are speaking now of December 1913, are you?

A. No.

Q. Please limit yourself to the question, will you?

A. Well, I will have to look up and get what information I can before I can answer that question."

And afterwards, to wit: On the sixteenth day of July, 1926, there was filed in the office of the clerk of this court an appearance of counsel for Appellee, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3727. October Term 1925.

L. P. Larson, Jr. Company

vs.

Wm. Wrigley, Jr. Company

The Clerk will enter my appearance as counsel for the Wm. Wrigley, Jr. Company.

WALLACE R. LANE.

Endorsed: Filed July 16, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-third day of July, 1926, the following further proceedings were had and entered of record, to wit:

Friday, July 23, 1926.

Court met pursuant to adjournment.

Present:

Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Wm. Wrigley, Jr. Company
3727 *vs.*
L. P. Larson, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of Mr. Charles H. Aldrich, counsel for appellant, and by Mr. Henry Russell Platt, counsel for appellee, it is now here ordered that the time for filing brief for appellant in this cause be, and the same is hereby extended to August 20, 1926, and the time for filing brief for appellee is hereby extended to twenty (20) days before the hearing of this cause.

It is further ordered that this cause be placed on the calendar of the October Session of the October Term, 1926, of this court.

And afterwards, to wit: On the ninth day of August, 1926, the following further proceedings were had and entered of record, to wit:

Monday, August 9, 1926.

Court met pursuant to adjournment.

Present:

Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

L. P. Larson, Jr. Company
3727 *vs.*
Wm. Wrigley, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On application of Mr. Charles H. Aldrich, counsel for the appellant, it is ordered that leave be, and is hereby granted to withdraw from the files Volume III of the Original Transcript of the Master's Report in the above entitled cause.

And afterwards, to wit: On the twenty-fifth day of August, 1926, there was filed in the office of the clerk of this court an appearance of counsel for Appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3727. October Term 1925.

L. P. Larson, Jr. Company,
Appellant,

vs.

Wm. Wrigley, Jr. Company,
Appellee.

The Clerk will enter my appearance as counsel for the appellant.

CHARLES H. ALDRICH,
111 West Jackson St.,
Chicago.

Endorsed: Filed August 25, 1926. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the fifth day of October, 1926, of the October Term in the year of our Lord one thousand nine hundred and twenty-six and of our Independence the one hundred and fifty-first.

And on the same day, to wit: On the fifth day of October, 1926, the following further proceedings were had and entered of record, to wit:

Tuesday, October 5, 1926.

Court opened by proclamation of crier.

Present:

Hon. Evan A. Evans, Circuit Judge, presiding.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

L. P. Larson, Jr. Company
3727 *vs.*
Wm. Wrigley, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing Friday, November 12, 1926.

And afterwards, to wit: On the twenty-first day of October, 1926, the following further proceedings were had and entered of record, to wit:

Thursday, October 21, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.

L. P. Larson, Jr. Company
3727 *vs.*
Wm. Wrigley, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is ordered by the court that the time for filing reply brief for appellant in this cause be, and the same is hereby extended to October 27, 1926 and the time for filing reply brief for appellee is hereby extended to October 27, 1926.

And afterwards, to wit: On the twenty-seventh day of October, 1926, there was filed in the office of the clerk of this court an appearance for Appellee, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 3727-3728 October Term, 1926.

L. P. Larson, Jr. Company,
Appellant (*Defendant and Counterclaimant*),
vs.
Wm. Wrigley, Jr. Company,
Appellee (*Plaintiff and Defendant to Counterclaim*).

Wm. Wrigley, Jr. Company,
Appellant (*Plaintiff and Defendant to Counterclaim*),
vs.
L. P. Larson, Jr. Company,
Appellee (*Defendant and Counterclaimant*).

The Clerk will enter my appearance as Counsel for the Wm. Wrigley, Jr. Company.

ISAAC H. MAYER,
2010-208 South LaSalle Street.

Endorsed: Filed October 27, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-eighth day of October, 1926, there was filed in the office of the clerk of this court an appearance of counsel for the Appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3727. October Term, 1926.

L. P. Larson, Jr. Company,
Appellant,

vs.

Wm. Wrigley, Jr. Company,
Appellee.

The Clerk will enter my appearance as Counsel for the Appellant.

GEORGE I. HAIGHT,
1041 The Rookery.

Note.—Must be signed by a member of the Bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual and not firm names must be signed.

Endorsed: Filed Oct. 23, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twelfth day of November, 1926, the following further proceedings were had an entered of record, to wit:

Friday, November 12, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

L. P. Larson, Jr. Company
3727 *vs.*
Wm. Wrigley, Jr. Company

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Wallace R. Lane and Mr. Isaac H. Mayer, counsel for appellee, and by Mr. Charles H. Aldrich and Mr. George I. Haight, counsel for appellant, and the court having heard the same takes this matter under advisement.

And afterwards, to wit: On the second day of April, 1927, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term and Session, 1926.

No. 3727.
L. P. Larson Jr. Company,
Appellant,
vs.
Wm. Wrigley Jr. Company,
Appellee.

No. 3728.
Wm. Wrigley Jr. Company,
Appellant,
vs.
L. P. Larson Jr. Company,
Appellee.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 2, 1927.

Before ALSCHULER, EVANS and PAGE, *Circuit Judges.*

ALSCHULER, *Cir. J.* Both parties appeal from a decree which awarded L. P. Larson Jr. Company (herein called Larson) $1,384,649.12, as net profits on sales by Wm. Wrigley Jr. Company (herein called Wrigley) of the latter's brand of "Doublemint" gum sold in package dress held by this court to have infringed Larson's "Wintermint" gum package. The decree for the accounting was awarded pursuant to the direction of this court as made in *Larson Jr. Co.* v. *Wrigley Jr. Co.,* 253 Fed. 914. During the accounting certain questions arose which were brought to, and considered and determined by this court. *In re Larson Jr. Co.* 275 Fed. 535. The facts leading to these adjudications, together with quotations from those opinions here applicable, and the propositions there and here in controversy, are clearly and sufficiently set forth in Judge Wilkerson's opinion disposing of exceptions by Wrigley to the master's report. *Wrigley Jr. Co.* v. *Larson Jr. Co.,* 5 F. (2d) 731.

The thousands of pages of evidence taken before the master, the near 1500 pages of briefs submitted here, with indexed citations (including duplications) of over 800 cases, have imposed on us a task of no mean proportions, in considering the various more or less complicated questions.

At the threshold we are met with the question of the scope of the accounting under the decree—whether Wrigley must account for all sales of "Doublemint" in the infringing dress, or only such as were made in territory wherein Larson competed with Wrigley, and incidentally whether Wrigley was entitled to show that "Doublemint," however in the infringeing dress, was sold with knowledge on the part of purchasers that it was Wrigley's produce, or whether the sales were made because of the superiority of the Wrigley product, and faith in the Wrigley name, and to no extent because of Larson's standing or reputation in the trade.

We are in accord with Judge Wilkerson's reasoning and conclusion that the decisions of this court determined the law of the case thereon, and that the accounting was to be for profits arising from all the sales,—meaning, of course, the net profits. The consolidated causes involved in the first appeals had been fully heard upon their merits, and pursuant to the reversing and remanding order for decree on Larson's counterclaim, the district court entered its decree for an accounting for all the profits, and if there remained any question as to the law of the case in this regard, it was settled by this court upon the subsequent appeal and mandamus proceedings here. (275 Fed. 535.)

But apart from the proposition of the law of the case, we are satisfied that under the very exceptional circumstances here appearing Wrigley is in no position to claim that Larson did not compete, and was an unknown factor in much of the territory wherein "Doublemint" was sold. The forestalling and oppressive tactics employed by Wrigley for the purpose of eliminating Larson as an actual or potential competitor, cry out against Wrigley's urging in defense the success of these very tactics. Wrigley may not thus lawlessly clip Larson's wings, and escape liability for the profits of its appropriation of Larson's package dress on the plea that Larson could not fly.

If the rule contended for by Wrigley were here to prevail, it is apparent that little or no proof could be made of substantial profits, or damages either. It would be manifestly impossible, even if the infringement were of the "Chinese

copy" variety, to show that, but for the sale of Wrigley's "Doublemint" in the infringing dress, the individual users would have purchased Larson's "Wintermint." Even if in a few instances this might be done, it would be humanly impossible, even though the effort and expense were not prohibitive, to have sought out and produced the evidence from any considerable number of users. Neither could it be known into what territory Larson would have pushed its trade but for Wrigley's oppressive and forestalling practices. The entrant into a field of endeavor might, thus early in his business career, be throttled and eliminated from competition, and his distinctive trade dress seized and used by a powerful opponent, with no measure for affording adequate relief. The more flagrant, and therefore the more effective the invasion of another's rights, the more certain and complete would be the invader's immunity. Injunctive relief may be sufficient for the future, but the invasion during the years of litigation to secure it, must be otherwise dealt with.

Under all the circumstances we do not see how, in this case, a measure of recovery less than award of the entire net profits from the use of the infringing package would afford due measure of reparation. That an award on this basis might permit recovery of a larger sum than would likely have been the net profits of the injured party if left undisturbed, is an incident of the invasion of which this invader is not in position to complain.

The account which Wrigley filed with the master, showed for the accounting period (July 28, 1914, to December 2, 1918) total sales of all brands of gum (except in Canada and Austrlia) of nearly $57,000,000, of which the total of "Doublemint" in the infringing dress was almost $9,000,000, and the gross profits attributable to "Doublemint" $5,152,689.32. As to these figures there is no controversy.

The contested issues on the accounting arise over allowance or rejection of various items claimed by Wrigley in reduction of this gross "Doublemint" profit. The first Wrigley account filed showed items which indicate for the entire accounting period some loss on "Doublemint." A supplemental account, later filed on its behalf, introduced additional items in reduction, which show much greater loss for the period.

ADVERTISING.

The item of most importance, and perhaps most sharply controverted, is that of advertising. For years prior to put-

ting out the "Doublemint" brand Wrigley was an extremely heavy advertiser, and before placing "Doublemint" on the market had established a large trade in gum—"Spearmint" being its specially advertised brand. On putting out the "Doublemint" brand a very heavy and extensive advertising program was inaugurated, and for a considerable time "Doublemint" was greatly stressed. The previously heavily advertised "Spearmint" continued also to be much advertised, and later the policy seemed to be to put special stress on the name "Wrigley," but including both "Doublemint" and "Spearmint" in the advertising matter. Still later in the period Wrigley brought out the "Juicy Fruit" brand, and advertised it with the rest, though not so extensively as "Doublemint." The total expended during the accounting period for advertising, such as newspaper, magazine, bill board, street car advertising, electric signs, and the like, was $6,798,662.73.

Intricate computations of the advertising items were made, each on a different basis, for allocating to "Doublemint" its proper proportion of these items. Wrigley's accountant assigned to "Doublemint" $2,872,844.43, while Larson's accountant fixed it at $1,017,183.59. The master worked out a complicated system whereby a very considerable portion of the advertising was charged up as "institutional," to be amortized in four years, that is, one-fourth of the cost to be charged off for each year as the expense for that year of such advertising. In this way alone much of the advertising expense for the last three years of the period was projected forward; for example, for an "institutional" advertisement for the last year of the accounting period only one-fourth would be charged against the gross profits for that period, and three-fourths projected beyond that period, upon the theory that the advertisement, though contracted and paid for in the first year, will be effective as an advertisement for four years, and that such future benefit will accrue to Wrigley as an institution. We cannot accept as practically probable the proposition that an advertisement is as potent throughout a four year period as during the year of its publication. And this applies, in large measure, as well to much of the more permanent forms of advertising, such as bill boards and electric signs. In time even these become obsolete and stale, and from time to time are renewed or changed, to say nothing of the cost of upkeep. Besides, all of that part of the advertising cost attributable wholly to the

infringing "Doublemint," which remained unearned at the close of the accounting period, became lost to Wrigley through the injunction. Nevertheless, the expense for this advertising had been contracted and paid for in good faith, and however it may have been wholly or partly unearned at the close of the accounting period, it was none the less an expense which should be deducted in fixing the net profits on "Doublemint." Where the injured party seeks the profits of an infringer, he takes the chance of their reduction or even extinguishment through expenses and losses actually incurred, however unwisely or even improvidently, so long only as they were incurred in good faith.

Our investigation of the record, and consideration of the briefs convinces us that far too large a part of the advertising expense was, by the master's report, accredited to the future, and not sufficient to the accounting period, and that much too small a part of the entire advertising costs was attributed to "Doublemint."

To undertake the allocation of each of the almost innumerable items of advertising to the various brands, and to "institution," would be indeed a most difficult task, and one wherein certainty would not, in the nature of things, be possible. But laborious examination of the many advertisements appearing in the transcript, and of the numerous tables, charts, graphs, and computations thereon, and the evidence concerning them, together with the very elaborate arguments of counsel submitted on the subject, and the report of the master and the opinion of the district judge, satisfies us that the conclusions and findings and figures reached by the district court upon the subject of advertising far more nearly comport with the approximate equity between these parties than those the master reported. Upon this item we quite despair of reaching a result more equitable than that reached by the district court, and we see no reason for disturbing its conclusions thereon, as carried into the decree.

Contingent Liability for Unredeemed United Profit Sharing Coupons.

On this item the master charged against "Doublemint" gross profits $98,519.06, which the district court increased by $64,715.60. With each 5 cent package of gum there was enclosed a profit sharing coupon good for one-fifth of a cent, and also coupons of larger denomination with cartons of gum packages. The coupons were exchangeable either for cash

or merchandise, and unlimited as to time of presentation. Many millions were put out each year. Their redeemability in articles of merchandise of various kinds was an incentive for saving them until sufficient quantities accumulated to effect a desirable exchange. Of course many became lost and will never be redeemed. As to those actually redeemed no question arises. The dispute comes respecting those not redeemed, which continue to be a potential liability of Wrigley, since Wrigley must pay the Profit Sharing Company on the basis of $3 for each 1000 of one-fifth cent coupons presented. Evidence was offered of the experience of others who had for many years given out such coupons with their merchandise. There was evidence of very substantial redemptions for many years after their issuance. It appears that the government, in the computation of profits, allowed Wrigley 60 per cent. of the face value of the coupons issued in each year as fairly representing this liability. The master's allowance was based on a 33⅓ per cent. of such redemption, which the district judge raised by 5 per cent. From a careful review of the situation we are satisfied that the percentage of redemption allowed by the court is still too low, and ought to be somewhat further increased. In our judgment an additional 6⅔ per cent. over and above the further allowance by the district court, making in all 45 per cent., probably would not overestimate Wrigley's ultimate liability upon the unredeemed coupons, and we are of opinion that this charge against "Doublemint" gross profits should be increased accordingly.

Federal Income and Profits Taxes.

Wrigley's account, as first filed, claimed for this item $563,933.89 attributable to "Doublemint" profits; in the supplemental account filed it was stated at $621,108.97. The master states that these figures so claimed are on the basis that the "Doublemint" profits were the last to be made and should bear the highest rate of tax, but states that this theory was afterwards conceded to be improper, and that the "Doublemint" share of federal taxes, on the basis of the proportion of profits, would be $372,942.09. Both master and court refused to allow any such tax in reduction of the profits, and the decree represents no deduction for such taxes paid by Wrigley.

We do not understand why federal income and excess profits taxes paid by a corporation are not a proper item of

expense to be charged against the gross profits for the year in the ascertainment of what the net profits for such year were. If instead of only the "Doublemint" profits, Larson were held entitled to receive from Wrigley the entire net profits of the Wrigley business, can it be doubted that there would be deducted from the gross profits the federal income and excess profits taxes which Wrigley had paid? This might be simple enough in a case where the accounting was for the net profits of an entire business. But is the principle any different where the liability is for only a part of the net profit?

It is stated, both by the master and the district judge, that Larson would, in any event, have to pay federal income tax on the amount decreed, for the year in which the decree was paid. This might be so in some cases. But if it appears that the amount decreed is only what is left after reimbursement to Wrigley of the federal tax already paid thereon, it is unthinkable that collection of the same tax from Larson would be again undertaken.

Moreover, the very theory on which Larson may recover these net profits from Wrigley is that Wrigley, in handling the infringing "Doublemint" gum packages, did so as Larson's trustee or agent—albeit, *ex maleficio*. While equity requires in such circumstances accounting for the profits, equity also allows in reduction, outlays in that behalf made in good faith; and what outlay more necessary—yea, compulsory, than the federal income and excess profits tax? If an agent, conducting business for an absent principal, pays such tax on the profits, should the principal be required to pay another such tax if and when he collects the balance due him from the agent? Surely this ought not to be.

The master reasoned that if required to pay the net profits, unreduced by "Doublemint's" fair proportion of the tax, Wrigley could deduct the whole amount paid from subsequently returned profits taxes. This would scarcely meet the situation. There may be no profits adequate therefor, in which event the tax thus paid would be lost to Wrigley. But, in any event, we do not think it would be equitable as between these parties to require Wrigley to pay back the full net profits without any reduction for this tax, on the faith that somehow and somewhere and sometime it will be refunded.

In dealing with a comparable situation, Judge Rose said: "where the owner of a patent seeks to charge the infringer,

as a trustee, with the profit made, no arbitrary rule should require him to turn over a sum greatly exceeding any profit the law has allowed him to keep for himself. Only equity can award profits, and, in equity, equity must be done." *Sly Mfg. Co.* v. *Pangborn Corp.,* 276 Fed. 971. The court of appeals specifically approved this reasoning. s. c. 284 Fed. 217.

While not undertaking to lay down a hard and fast rule for fixing the amount of such tax deduction, we venture some suggestions thereon. It is contended for Wrigley that since the Wrigley profits for the rest of the business carried the Wrigley taxes into the highest bracket, the additional tax on account of the profit attributable to "Doublemint" was likewise taxable at the highest rate, and that the deduction from the profits attributable to "Doublemint" should be fixed at such rate. There would be more in this contention if Larson's excess profits taxes for the years in question likewise reached into the highest bracket, so that further profit would likewise have carried the highest rate.

But if this is not the fact, it would not be equitable to require Larson to pay at a higher rate than that at which it would have paid if the net profits had been paid by Wrigley to Larson as they accrued, and before Wrigley had paid any tax thereon. In undertaking to avoid inequity toward Wrigley, inequity should not be done Larson through requiring Larson to bear a higher tax than would have been collectible had the profits been paid over as earned.

It occurs to us that the total net profits awarded Larson (without deduction for federal income and excess profits taxes) should be allocated, as nearly as may be, to each year during the accounting period in which they were earned; and that, considering such amounts for each year as additional net profit to Larson in such year, the added amount of income and excess profits tax thereon which Larson would have had to pay should be estimated, as nearly as may be done; the aggregate of such yearly additional tax which Larson would thus have been required to pay, to be deducted from the profits on "Doublemint" as found. Larson would thus be paying only the taxes it would have paid had it received the profits as they accrued, and Wrigley will have credit at once for the taxes thus paid on Larson's profits. True, this might leave Wrigley out of pocket to the extent that its payment at the highest rate on "Doublemint" profits exceeded the amount at any lower rate at which Larson

would have been charged; but this is not Larson's fault, and if, as between the two, one must suffer, it should be Wrigley, who brought about the condition. Whether or not Wrigley might then have a collectible claim against the government through having paid at a higher rate upon the profits to which Larson was entitled, and which Larson thus actually paid at a lower rate, is not here involved.

Possibly difficulty will be experienced in allocating the net profits awarded (exclusive of deduction for these taxes) to the different years of the accounting period. While it may be this cannot be accurately done, it should be approximated as nearly as the nature of the case will admit. Of course nothing here said has application to whatever, if any, liability for income tax may accrue to Larson on account of payment, when made, of interest on the award.

We are of opinion that the amount of this tax attributable to the net profit on "Doublemint" should be ascertained under the direction of the district court, and the award to Larson reduced accordingly.

Interest on Invested Capital.

Under this heading the district court allowed a deduction of $259,120.54 from gross profits for interest on investment in tangibles, and $45,260.79 for interest on investment in patents and patent rights. The master's report refused all allowance for such interest. As pointed out in Judge Wilkerson's opinion, this court is committed to the principle that in such cases interest on invested capital should be deducted. No valid reason appears to us why the amounts which the court fixed are not proper. There was evidence that the gum-making machinery covered by the patents which Wrigley acquired was in constant and profitable use in the Wrigley factories during the infringing period, and to the extent of Wrigley's actual investment in such patents, it is not apparent to us why a fair proportion of interest thereon attributable to "Doublemint" should not be deducted from the gross profits, as well as the interest on investment in tangibles. We are in accord with the district court's disposition of these items.

Interest on Wrigley's Invested Profits.

We are likewise satisfied with the treatment by the district court of this item, and see no reason for disturbing it.

Depreciation of Patents.

For this Wrigley claims reduction of an amount applicable to "Doublemint," at the rate of one-seventeenth of the value of the patents for each year of the accounting period, as applied to all the brands, upon the theory that this proportion of the life of the patent expired each year. There was no evidence of depreciation beyond that afforded by the flight of time. It might well have been the case that the patents did not depreciate in value, but that, in fact, they appreciated, depending quite wholly upon conditions other than the expiration of a portion of a period of their grant. We believe the allowance of interest on the investment in the patents is, under all the circumstances, a sufficient charge against profits on account of the patents.

Profits of Canada Corporation.

The district court properly found that the accounting should not extend to the profits of this corporation. It was organized in Canada for the purpose of carrying on the gum business there; and while its stockholders were also Wrigley stockholders, and it handled there the Wrigley brands in very much the same manner as they were handled in the United States, it was a distinct entity, organized admittedly in good faith, and was not a party to this action.

Accountants' Fees.

The master recommended the allowance of the fees of Touche, Niven & Co., accountants, for $17,591.21 for their services. The court in its opinion disallowed the fees as costs, but gave no reason. There is nothing in the decree thereon, and so far as this may be regarded an adjudication we consider the item, and the very full discussion thereof in the briefs and arguments. The decree of the district court authorized the master to employ accountants, which he did, and their fees of $7,359.50 have been properly ordered allowed as costs. Each party additionally employed its own accountants—Touche, Niven & Co. by Larson. The master's recommendation of allowance was upon the theory that the account filed by Wrigley was not correct, and not such an account as was contemplated by equity rule 63. It is true that the accounts filed showed for the accounting period a substantial loss on "Doublemint." The very important elements of sales of "Doublemint," manufacturing costs, and gross profits

were accepted without dispute; and likewise substantially all of the item of nearly $1,000,000 for overhead expenses. The loss shown is made to appear from items, the allowance or disallowance of which was influenced rather by the correct principle to be applied, than by falsity in the disclosure.

As to the most important item, advertising, there was no dispute as to amounts paid, but as to their allocation. Wrigley asserted that something over $2,800,000 should be charged to "Doublemint." Touche, Niven & Co. reported slightly over $1,000,000 as so applicable. Various theories of allocation were put forth—proportion of sales, space method, brand advertising, and institutional advertising. To elaborate each of these, with the exception of the first, involved investigation and computation of vast data. Such data as Wrigley had were without objection or concealment at the disposal of all concerned. Then there was Wrigley's contention of nearly $300,000 for interest on good will, which was rejected, and for federal income tax, which was also disallowed, and certain other items claimed, the allowance of much of which would indeed have wiped out all the profit on "Doublemint." The fact that such were claimed as deductions from the gross profits which were truly disclosed, was not, in our judgment, such a transgression of equity rule 63 as to have warranted the allowance against Wrigley of this item of accounting expense, and the court properly disallowed it.

Interest on Award.

The master recommended allowance of interest on the award on his finding of net profits at the rate of 6 per cent. per annum, from the end of the accounting period, December, 1918. The decree adopted the same rate, but fixed as the beginning date for interest on the award, the filing of the master's report, November, 1923.

In a number of cases of accounting for infringement of patents, this court has allowed interest from date when infringement ceased. *B. F. Goodrich Co.* v. *Consolidated Rubber Tire Co.*, 251 Fed. 617; *Malleable Iron Range Co.* v. *Lee*, 263 Fed. 896; *Superior Tool Machine Co.* v. *Cincinnati Lathe & Tool Co.*, 284 Fed. 267; *Starr Piano Co.* v. *Auto Pneumatic Action Co.*, 12 F. (2d) 586.

In the first three of these cases the award was for damages, the first two predicated on reasonable royalty, and the third on lost profits. In these the power of the court to award additional damages up to treble the amount found is

given by statute in cases of infringement of patent, and the court has discretion to increase the damages found, whether by the name of interest or otherwise; and in the last case cited the discretion to award damages where profits were allowed, was justified, not only upon the prior cases, but further upon *Miller* v. *Robertson,* 266 U. S. 243. This was not a suit for infringement of patent, but involved damages for breach of a contract, and from this case the opinion in Starr Piano Co. quotes this sentence: "When necessary, in order to arrive at fair compensation, the court, in the exercise of a sound discretion may include interest or its equivalent as an element of damages," the inference being that in the Starr Piano case carrying back the interest was deemed proper to arrive at fair compensation.

The principle is not new. It was old even in *Tilghman* v. *Proctor,* 125 U. S. 136, where the court, upon a similar question, said: "If the question thus presented were a new one, it would require grave consideration. But by a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; * * (citing cases) * * Nothing is shown to take this case out of the general rule. * * Interest therefore should be allowed * * only from the day when the master's report was submitted to the court." This case, while recognizing the general rule, does not exclude the discretion of the court to allow interest back of that date, where "special circumstances" may justify. In the recent patent infringement accounting case of *National Tube Co.* v. *Mark,* 10 F. (2d) 430, (C. C. A.), where damages were fixed on a reasonable royalty basis, the court, considering the question of interest, while stating that it was usual to allow it only from date of master's report, exercised its discretion to make further allowance under the particular facts of that case by awarding further interest for half the time between date of infringement and date of master's report.

It must be remembered that in the appeals here there is not involved a patent, or a statutory trade-mark, and that any rules peculiar to such do not of necessity apply in fixing interest; but the usual practice of computing interest in an accounting from the date of the master's report, prevails,

unless, as indicated in the cases cited, circumstances require an earlier beginning date. The award here in issue is so palpably and unquestionably ample to fully compensate Larson for any and all invasion of its rights, as to suggest no circumstances which invoke the court's discretion to enlarge it by allowance of interest back of the date of the master's report, a condition which, in our judgment, likewise forbids an interest rate above 5 per cent.

We do not deem it necessary to present further discussion of questions raised in the briefs, especially such as were considered and determined in Judge Wilkerson's opinion. We approve the decree of the district court in all respects, save as to the items of United Profit Sharing Coupons, federal income and excess profit taxes, and rate of interest upon the award; and in order that the decree may be made to conform with our views as above stated respecting these items, and to take further evidence, if deemed necessary, respecting the item of federal income and excess profits taxes, and to make further deductions accordingly from the award as made, the cause is remanded to the district court with direction further to proceed, and to enter a decree in consonance with these views.

The costs in this court of these appeals shall be divided equally between the parties.

And on the same day, to wit: On the second day of April, 1927, the following further proceedings were had and entered of record, to wit:

Saturday, April 2, 1927.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

L. P. Larson, Jr. Company
3727 *vs.*
Wm. Wrigley, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions further to proceed and to enter a decree in consonance with the views expressed in the opinion of this court.

It is further ordered that the costs on this appeal shall be equally divided between the parties.

And afterwards, to wit: On the twenty-first day of April, 1927, there was filed in the office of the clerk of this court a certain Petition for a Rehearing on behalf of the L. P. Larson, Jr. Company, which said Petition is not copied here.

And on the same day, to wit: On the twenty-first day of April, 1927, there was filed in the office of the clerk of this court a Proof of Service, which said Proof of Service is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

October Term and Session, 1926.

No. 3727,
L. P. Larson Jr. Company,
Appellant,
vs.
Wm. Wrigley Jr. Company,
Appellee.

No. 3728,
Wm. Wrigley Jr. Company,
Appellant,
vs.
L. P. Larson Jr. Company,
Appellee.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To Messrs. Isaac H. Mayer and Wallace R. Lane, Chicago:

You are hereby notified that we have today filed a petition for rehearing, and brief in support thereof, in the above entitled case, of which we hand you each three copies.

CHARLES H. ALDRICH,
GEORGE I. HAIGHT,
RALPH L. PECK,
CHESTER D. KERN,
Attys. for L. P. Larson Jr. Company.

Received a copy of the above notice, together with three copies of the petition for rehearing and brief in support thereof, this 21st day of April A. D. 1927.

ISAAC H. MAYER,
WALTER R. LANE.

Endorsed: Filed April 21, 1927. Edward M. Holloway, Clerk.

And on the same day, to wit: On the twenty-first day of April, 1927, there was filed in the office of the clerk of this court a certain Petition for a Rehearing on behalf of the William Wrigley, Jr. Company, which said Petition for a Rehearing is not copied here.

And on the same day, to wit: On the twenty-first day of April, 1927, there was filed in the office of the clerk of this court a Proof of Service, which said Proof of Service is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1926.

No. 3727.
L. P. Larson Jr. Company,
Appellant,
vs.
Wm. Wrigley Jr. Company,
Appellee.

No. 3728.
Wm. Wrigley Jr. Company,
Appellant,
vs.
L. P. Larson Jr. Company,
Appellee.

} Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To Messrs. Charles H. Aldrich, George I. Haight, Ralph L. Peck and Chester D. Kern:

You Are Hereby Notified that we have this day filed a petition for rehearing on behalf of said Wm. Wrigley Jr. Company as appellant in said cause No. 3728, of which we hand you six copies.

ISAAC H. MAYER,
WALLACE R. LANE,
Solicitors for said Wm. Wrigley Jr. Company, appellant.

Received a copy of the above notice, together with six copies of said petition for rehearing, this 21st day of April, 1927.

CHARLES H. ALDRICH
GEORGE I. HAIGHT
RALPH L. PECK
CHESTER D. KERN

Endorsed: Filed Apr. 21, 1927. Edward M. Holloway, Clerk.

And afterwards, to wit: On the second day of May, 1927, there was filed in the office of the clerk of this court an Answer of the Wm. Wrigley, Jr. Company to Petition for a Rehearing, which said Answer is not copied here.

And on the same day, to wit: On the second day of May, 1927, there was filed in the office of the clerk of this court an Answer of The L. P. Larson, Jr. Company to Petition for a Rehearing, which said Answer is not copied here.

And on the same day, to wit: On the second day of May, 1927, there was filed in the office of the clerk of this court a Proof of Service, which said Proof of Service is in the words and figures following, to wit:

Nos. 3727, 3728.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term and Session, 1926.

L. P. Larson Jr. Company,
Appellant,
vs.
Wm. Wrigley Jr. Company,
Appellee.

Wm. Wrigley Jr. Company,
Appellant,
vs.
L. P. Larson Jr. Company,
Appellee.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To Messrs. Isaac H. Mayer, and
Wallace R. Lane,
Chicago.

You are hereby notified that we have today filed a short brief in answer to the petition for rehearing filed in behalf of the Wm. Wrigley Jr. Company. We hand you herewith eight copies of such brief.

CHARLES H. ALDRICH,
GEORGE I. HAIGHT,
RALPH L. PECK,
CHESTER D. KERN,
Solicitors for L. P. Larson Jr. Co.

Received copy of the above notice, with eight copies of brief, this 2nd day of May A. D. 1927.

ISAAC H. MAYER, JR.

State of Illinois, } ss.
County of Cook. }

I, Chester D. Kern, on oath state that on May 2, 1927, at about 12:30 P. M., I called at the office of Messrs. Parkinson & Lane, Room 1520 Marquette Building, with the notice which appears on the other side of this sheet, and eight briefs which I desired to deliver to said office; that I did not find Mr. Lane in, and found no one who would acknowledge service of the notice, although it was already signed by Mr. Mayer. I therefore make this affidavit of attempted service.

CHESTER D. KERN.

Subscribed and sworn to before me, this 2nd day of May, 1927,

A. G. LOVELESS,
(Seal) *Notary Public.*

(Endorsd) Filed May 8 1927 Edward M. Holloway Clerk.

And afterwards, to wit: On the thirtieth day of August, 1927, the following further proceedings were had and entered of record, to wit:

Tuesday, August 30, 1927.

Court met pursuant to adjournment.

Present:

Hon. Samuel Alschuler, Circuit Judge.
Hon. George T. Page, Circuit Judge
Edward M. Holloway, Clerk
Palmer E. Anderson, Marshal

Before:

Hon. Samuel Alschuler, Circuit Judge
Hon. Evan A. Evans, Circuit Judge
Hon. George T. Page, Circuit Judge

L. P. Larson, Jr. Company
3727 —*vs*—
Wm. Wrigley, Jr. Company

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

And afterwards, to wit: On the thirty-first day of August, 1927, the following further proceedings were had and entered of record, to wit:

Wednesday, August 31, 1927.

Court met pursuant to adjournment.

Present:

Hon. Samuel Alschuler, Circuit Judge
Edward M. Holloway, Clerk
Palmer E. Anderson, Marshal

L. P. Larson, Jr. Company 3727 —*vs*— Wm. Wrigley, Jr. Company	}	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of Mr. George I. Haight, counsel for appellant in this cause it is now here ordered that mandate in this cause be, and the same is hereby stayed until the further order of this court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 4495 to 4535, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel, the petitions for a rehearing and the answers thereto) in the case of

L. P. Larson, Jr. Company
Appellant

vs.

Wm. Wrigley, Jr. Company
Appellee

No. 3727, October Term, 1926, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Seventeenth day of October A. D. 1927.

EDWARD M. HOLLOWAY
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the fifth day of October, 1926, of the October Term in the year of our Lord one thousand nine hundred and twenty-six and of our Independence the one hundred and fifty-first.

And afterwards, to wit: On the twelfth day of November, 1926, the following further proceedings were had and entered of record, to wit:

Friday, November 12, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

Wm. Wrigley, Jr. Company
3728 *vs.*
L. P. Larson, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Wallace R. Lane and Mr. Isaac H. Mayer, counsel for appellant, and by Mr. Charles H. Aldrich and Mr. George I. Haight, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to wit: On the second day of April, 1927, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is not copied here as the same appears in the transcript of record in Cause No. 3727, *L. P. Larson, Jr. Company* vs. *Wm. Wrigley, Jr. Company,* certified herewith.

And on the same day, to wit: On the second day of April, 1927, the following further proceedings were had and entered of record, to wit:

Saturday, April 2, 1927.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

Wm. Wrigley, Jr. Company
3728 *vs.*
L. P. Larson, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the District Court in this cause be, and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said District Court with direction further to proceed and to enter

a decree in consonance with the views expressed in the opinion of this court.

It is further ordered that the costs on this appeal shall be equally divided between the parties.

And afterwards, to wit: On the twenty-first day of April, 1927, there was filed in the office of the clerk of this court a petition for a rehearing on behalf of the L. P. Larson, Jr. Company, which said petition for a rehearing is not copied here.

And on the same day, to wit: On the twenty-first day of April, 1927, there was filed in the office of the clerk of this court a petition for a rehearing on behalf of the Wm. Wrigley, Jr. Company, which said petition for rehearing is not copied here.

And afterwards, to wit: On the second day of May, 1927, there was filed in the office of the clerk of this court an Answer of the L. P. Larson, Jr. Company to Petition for Rehearing, which said Answer is not copied here.

And on the same day, to wit: On the second day of May, 1927, there was filed in the office of the clerk of this court an Answer of the Wm. Wrigley, Jr. Company to Petition for Rehearing, which said Answer is not copied here.

And afterwards, to wit: On the thirtieth day of August, 1927, the following further proceedings were had and entered of record, to wit:

Tuesday, August 30, 1927.

Court met pursuant to adjournment.

Present:

Hon. Samuel Alschuler, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

Wm. Wrigley, Jr. Company
3728 *vs.*
L. P. Larson, Jr. Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petitions for rehearing in this cause be and the same are hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 4539 to 4542, inclusive, contain a true copy of the Hearing, Decree and Order denying petitions for a rehearing in the case of

Wm. Wrigley, Jr. Company,
Appellant,

vs.

L. P. Larson, Jr. Company,
Appellee,

No. 3728, October Term, 1926, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this seventeenth day of October, A. D. 1927.

EDWARD M. HOLLOWAY,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 5, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. And it is further ordered that the questions to be reexamined shall be limited to those relating to the deductions of federal income and excess profits taxes from the net profits awarded to the petitioner.

Enel